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## **International Trade, Extraterritorial Power, and Global Constitutionalism: A Perspective from Constitutional Pluralism**

*By Gareth Davies\**

### **A. Introduction**

This Article starts from two premises. The first is that power—particularly regulatory power—is increasingly exercised across and between jurisdictions, in particular as a result of the intertwining of economies via trade. The well-being of those involved in the production and trade in goods and services is determined by rules made in multiple jurisdictions, not just their own. Concern about the environmental and social impact of economic activity is a particular reason for jurisdictions to try and impose norms upon each other. The second premise is that the essence of constitutionalism is constitutional values and principles rather than particular institutional forms. Such forms are contingent and instrumental, in the service of the values and principles.<sup>1</sup> Many of those constitutional values and principles are concerned with the exercise of power (e.g., accountability, due process, and non-oppression).

The transnational exercise of power challenges national constitutions because the scope of national constitutions is limited to the jurisdiction and territory they govern, while the matters affecting the well-being of their population are not. National constitutions thus find themselves unable to guarantee their own values even within their territory. This is one of the recent critiques of national constitutional law and practice.<sup>2</sup> One possible reaction is to seek a global constitutional framework, often under the label of global constitutionalism, in which a unitary and hierarchical structure exists beyond the state. However, this Article suggests that this is both unrealistic in practice and undesirable in principle, for such a mega-constitution would be too far removed from the people to allow responsiveness, democracy, or self-realization.

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<sup>1</sup> Antje Wiener, *Global Constitutionalism: Mapping an Emerging Field* 2–3 (Conference Constitutionalism in a New Key? Cosmopolitan, Pluralist and Public Reason-Oriented, Working Paper, 2011), available at [http://cosmopolis.wzb.eu/content/program/conkey\\_Wiener\\_Mapping-Field.pdf](http://cosmopolis.wzb.eu/content/program/conkey_Wiener_Mapping-Field.pdf). See also Ester H. Karnell, *The EU as a Promoter of Values and the European Global Project*, 13 GERMAN L.J. (forthcoming Dec. 2012).

<sup>2</sup> Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 320–21 (2002).

This Article therefore offers a different kind of global constitutionalism, one that preserves constitutional values on the global scale by means of dialogue between the authors of power and those subjected to it. This notion is derived from the idea of constitutional pluralism, developed in EU legal studies, whose core idea is presented here as follows: A plural order can be constitutional.

The claim goes a little further. Plural constitutionalism is not a second-best option, a concession to the limitations of transnational law. On the contrary, it is the only kind of constitutionalism which deserves to be taken seriously at the transnational level.<sup>3</sup> No single constitutional order can embody the range of values and principles which constitutionalism entails, extending from the local to the universal and including both the encompassing regulation of power and the self-expression of the people. Respect for those values therefore requires that multiple autonomous legal orders exist, that none dominate the others (thus an absence of fully resolved hierarchy), and that they show respect for and recognition of each other.<sup>4</sup> Constitutionalism at a global scale necessarily lies not in institutions or hierarchies, but in the relationship between legal orders and the subjects and authors of those orders.

The Article proceeds as follows. Parts B and C explain the idea of regulatory pluralism, particularly in the context of international trade. The suggestion is that producers, traders, and consumers are effectively subject to regulation coming not just from the states where they are located, but also from the states with whom they are economically involved. Part D then argues that this should be seen as raising a constitutional problem because it amounts to the exercise of power by jurisdictions over groups of people who have no say in the law-making of that jurisdiction—power without accountability or representation. Parts E and F consider ways of thinking about this situation and different possible normative frameworks. The ideas of extraterritoriality and of global governance are briefly explored but dismissed as unsatisfactory. The first is a label rather than an explanatory concept, and the second is neither attractive nor realistic as a solution. Part G then moves to constitutional pluralism and explains the arguments of scholars who have sought to reconcile constitutionalism and a plurality of legal orders. It is argued here that constitutional pluralism is particularly plausible and attractive in the global concept, where other paths to constitutionality are absent. It offers an explanation of how a global network of overlapping jurisdictions, lacking a unique hierarchy, could, under certain conditions of accommodation and dialogue, nevertheless be described as a constitutional order in a meaningful sense. Part H then suggests that this is what global constitutionalism could, and indeed should, be understood to mean: The preservation of constitutional

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<sup>3</sup> For a similar argument, see the third claim in Miguel P. Maduro, *Three Claims of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 67 (Matej Avbelj & Jan Komarek eds., 2012).

<sup>4</sup> *Id.*

values within the inevitably and desirably competing and interacting orders of the global legal spaghetti soup.

#### **B. International Trade and Market Access Conditionality: Regulatory Pluralism**

States often require that goods sold within their jurisdiction comply with certain standards concerning quality or safety. They sometimes, and increasingly so, also require that the production of those goods complies with certain norms concerning the environment, sustainability, and human or labor rights.<sup>5</sup> Enforcement of the product standards is typically domestic, but controls on production standards are often carried out in the state of production by private agencies, whose certifications may then be relied upon by national laws.<sup>6</sup> Possession of such certification may be a condition for market access, for tax breaks, or for government purchase.

In a formal sense, each producer may choose whether it is worth his while to comply with the regulations of a given state and, if not, may choose not to export to that state. In competitive markets, however, that choice may be largely illusory. A decision not to comply, and therefore to abandon a market, will result in loss of sales and market share, with economic and human consequences for the producer, shareholders, employees, and members of the community of which the producer is a part. The company may fail, it may be taken over, or at the very least there may be a decrease in the economic welfare of those involved. This is ever more the case as modern production often requires significant investment (i.e., sunk costs), reducing the flexibility of a company and its capacity to adapt to decreases in sales.

Individual producers are also subject to the laws in force in the state where they are located. A failure to comply with these could, in theory, have more serious consequences than a failure to comply with foreign regulations. Unlike foreign governments, the domestic government has criminal sanctions within its enforcement repertoire. Typically, the results of ignoring domestic or foreign product or production rules will be of a similar type: There will be immediate financial repercussions—a fine or loss of sales—and the

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<sup>5</sup> See generally Gareth Davies, 'Process and Production Method' Based Trade Restrictions in the EU, in CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 69 (Catherine Barnard ed., 2008); Lorand Bartels, *Article XX of GATT and the Problem of Extraterritorial Jurisdiction: The Case of Trade Measures for the Protection of Human Rights*, 36 J. WORLD TRADE 353 (2002); Steve Charnovitz, *The Law of Environmental "ppms" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59 (2002); Robert Howse & Donald Regan, *The Product/Process Distinction: An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004); Gabrielle Marceau & Joel Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811 (2002).

<sup>6</sup> For a discussion on the use of the private sector in constructing regulation, see generally MICHELLE EGAN, *CONSTRUCTING A EUROPEAN MARKET* (2001).

company might ultimately be forced out of business. Indeed, it will not necessarily be the case that a failure to comply with domestic rules has more serious consequences than a failure to comply with foreign ones. Domestic enforcement measures may well pale beside the possibility of denied access to a major market, and a visit from a domestic inspector may be less feared than a visit from a private certification agency.

This is not to deny the formal difference between domestic and foreign regulations. The former have compulsory application, while the latter are merely a condition of market access. Their de facto impact, however, is similar, and, from the perspectives of individual well-being and freedom, justice, and social and economic consequences, the formal distinction is of little importance.

One may describe the situation applying to the individual producer as one of regulatory pluralism. The laws which constrain the individual producer's behavior originate from a number of different sources and jurisdictions.<sup>7</sup> Put another way, within a given territory, multiple sets of regulations exercise power over, and impose de facto sanctions upon, producers located there.

There is also a form of regulatory pluralism applying on the consumer market. Where product markets are global, the rules of a large state may in fact determine the nature of the products sold on other markets, as producers seek to produce a single standardized product. For example, the United States has wider and stricter rules concerning usability of computer equipment by disabled people than do most other jurisdictions. Because computers are globally traded, the result is that these rules have become the de facto standard for other markets, including the EU.<sup>8</sup> Various aspects of the computer equipment available to EU consumers are, in fact, determined by the rules in force in the United States, and it is practically impossible to buy computers not complying with these American rules. Of course, computers on sale in the EU must also comply with EU and local national regulations. The EU consumer market for computer equipment is thus characterized by regulatory pluralism.

Precisely analogous situations can occur in services markets, with the EU application of its Emissions Trading Scheme to air transport being the most notable example.<sup>9</sup> Access to EU

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<sup>7</sup> The phrase is also used where some or most of the regulators are private. See Fabrizio Cafaggi, *Private Regulation in European Private Law*, in *TOWARDS A EUROPEAN CIVIL CODE* 91 (Arthur Hartkamp et al. eds., 4th ed. 2010).

<sup>8</sup> See, e.g., Lisa Waddington, *The Internal Market and Disability Accessibility: Using EC Law to Establish an Internal Market in Disability Accessible Goods and Services* 7 (Maastricht Faculty of Law Working Papers, No. 3, 2008).

<sup>9</sup> Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, 2011 E.C.R. I-000. See also Laurens Ankersmit, Jessica Lawrence & Gareth Davies, *Diverging EU and WTO Perspectives on Extraterritorial Process Regulation*, 21 MINN. J. INT'L L. 14 (2012) (specifically discussing the extraterritorial aspects of the case). See the other papers in this special edition for discussion of its wider implications.

airports has been made conditional upon emissions-related payment, even where those emissions occurred outside EU airspace. Access to the EU market is linked to aspects of the “production” of the service outside the EU. This may be the beginning of a wider trend, and more service regulation may take account of the environmental or social consequences of actions of the service provider outside of the regulating jurisdiction. In this Article, however, the emphasis will be on goods and their production, if only for ease of explanation.

### C. The Causes of Regulatory Pluralism

Regulatory pluralism has been defined above in terms of factual power, rather than formal jurisdiction. As such, it is a question of degree. Regulatory pluralism has increased in breadth and intensity over recent decades as global trade has increased. This has made export markets more important and has intensified competition, so that the loss of markets and of competitive position is a greater threat to company survival than in a less global era. The need to comply with foreign laws is proportionate to the gains and losses associated with success or failure on those states’ domestic markets.<sup>10</sup> While global trade is a necessary background condition for regulatory pluralism, it is the spread of process and production regulation which the direct cause of such pluralism.

Although there are examples of product standards which go back centuries, it was the second half of the twentieth century which saw product regulation become ubiquitous and one of the important activities of the state. The spread of manufactured consumer goods had begun earlier, but took off in the post-war years, which saw a huge increase in material wealth among ordinary citizens, most notably in the United States but also, after a few years delay, in Europe. These goods—complex, expensive, vulnerable to invisible defects, increasingly indispensable to daily life—cried out for regulation both on grounds of safety and quality. The state had increased dramatically in size in the Second World War and was never again to shrink to its prewar dimensions. For the first time, the state began to assume the role of a systematic regulator of society. Product regulation can be seen alongside the welfare state as an aspect of the “risk society” in which law aimed not just to define moral limits, but to protect individuals from things going horribly wrong.<sup>11</sup> In the U.S. and EU, it is now the case that almost any product—whether an appliance, a foodstuff, clothing, or even a raw material—will be subject to regulations concerning its safety and often its fitness for use or quality.

Regulatory pluralism has reached a new level of intensity in recent years with the rise of production regulation through national legal measures addressing process and production

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<sup>10</sup> ERICH VRANES, *TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUE IN INTERNATIONAL LAW, WTO LAW, AND LEGAL THEORY* 166 (2009).

<sup>11</sup> ULRICH BECK, *RISK SOCIETY: TOWARD A NEW MODERNITY* 19–24 (1992).

methods (PPMs).<sup>12</sup> These are rules which regulate not the physical composition of the product, but rather the way that it is made. They usually address aspects of environmental protection and sustainability, or human rights and labor rights. For example, access to a market may be refused if goods have been made by child labor, if the rights of the production workers are not respected, or if production occurs in a way which is particularly harmful to the environment. In extreme cases, a total ban on sale may result from non-compliance, but in other cases PPM requirements are used as conditions for eligibility for government purchase. A state may, for example, decide only to purchase sustainably forested wood or “fair trade” coffee.<sup>13</sup>

The controversial aspect of these rules is that they seem to be an attempt to interfere in another state’s domestic affairs. While it is obvious that states have a legitimate interest in protecting their own consumers and enforcing product standards, the legitimate interest of State A in ensuring that workers, plants and animals in State B are treated according to the norms of A, even when B does not require this, entails a more complex argument.

PPMs have, however, proliferated in parallel with the increasing globalization of markets and the increasing proportion of goods on sale in the United States and EU which come from developing countries.<sup>14</sup> On the one hand, conscience dictates—to many—that rich countries should only import goods produced without exploitation or destruction. On the other hand, local production methods can increasingly be linked to global concerns—and to the interests of the importing country—as a result of global warming and the global loss of species and habitats. Making market access conditional upon production norms may be about pragmatic self-interest as much as it is about responsibility.

#### **D. The Constitutional Gap: Underrepresentation of Out-of-State Interests**

Regulatory pluralism creates a situation where power is exerted without accountability: Individuals have no voice in foreign jurisdictions whose rules nevertheless determine their welfare. Producers are subjected to conditions imposed by the importing states, without representation in the politics of those states.

This raises questions of economic efficiency. Where those bearing the costs of rules are not represented in the process of their formation, a temptation is created to underestimate those costs, even to trivialize them.<sup>15</sup> The regulating authority must only satisfy

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<sup>12</sup> See *supra* text accompanying note 5.

<sup>13</sup> For other examples, see Ankersmit et al., *supra* note 9.

<sup>14</sup> See *supra* text accompanying note 5.

<sup>15</sup> MIGUEL P. MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* 69–175 (1998); Joanne Scott, *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO* (The Jean Monnet Working Papers, No. 3/99, 1999).

those constituents within its jurisdiction, meaning that the moral aesthetic of the voting public is likely to be more determinative of the form of law than cost-benefit analysis in the state of production. Thus, a situation is created which invites the imposition of externalities, the formation of symbolic—rather than effective—legislation, and the glossing of inconvenient facts and costs borne elsewhere.

Regulatory pluralism should be expected to create political tensions, too. It is a situation akin to a benign but incompetent dictatorship: The foreign legislator is a political authority which exercises *de facto* power but does not see itself as obliged to listen, show accountability, or respond to concerns directly. Instead, the foreign legislator makes an appeal to an abstract and other-determined version of “your own best interests” and uses this to justify its interventions. Resentment of the foreign power will often be a reasonable response.

More importantly for this Article, regulatory pluralism raises constitutional questions. The constitutionality of a legal order encompasses issues like those above, revolving around accountability, responsiveness, and the representation of interests. Most national legal orders have a framework regulating these issues, guaranteeing an accountable political process and individual rights of appeal where interests are infringed without due process.

Yet where individuals are subject to a legal order of which they are not a constitutional subject, this constitutional position is threatened. Their own legal order cannot offer them protection, for the promises, sanctions and pressures of foreign law are outside of the domestic legislator’s scope. At most, the domestic government could forbid interactions: It could prevent trade. This would, however, be punishment in the name of protection, and while it might remove individuals from the reach of foreign regulation, that fact would be little comfort for them. And yet there would be a certain logic to this approach. By exposing them to trade, the state exposes domestic producers to power without responsiveness, the very situation which the national constitution—and arguably the state itself—exists to prevent.

What is captured here is a problem of modern constitutionalism. If constitutions, and constitutional expectations, are confined to the protection of basic human rights, then, because of the largely physical character of interactions which may violate these basic human rights, a state with a territory is able to guarantee them to its people. If the power which is regulated is no more than the monopoly of violence, then the marriage of state, territory and constitution is coherent. If, however, a life can be destroyed by poverty as well as by imprisonment, then a view of constitutionality in which human life and dignity are central will expect it to go further, providing not just a framework for the control of violence, but a framework for the management of welfare, distribution, and justice. Modern constitutions, and constitutional thinking, extend to the policing of public (and



private) power generally, including administrative decisions, the representation of interests, solidarity, distribution of resources, and other aspects of a “just” society.<sup>16</sup> The broader scope of this second constitutional approach imposes far more intense and structural constraints on societal and governmental arrangements than a minimalist human rights guarantee would do. Most importantly, it creates an image of the constitutional—of the just—which cannot be extrapolated to the wider world. While foreign governments can be prevented from directly impeding speech or religious freedom within the territory, so long as there is trade they cannot be prevented from impacting social and economic justice. Thus the more completely we order our values domestically, the less acceptable we implicitly find it to expose individuals to the arbitrary foreign power inherent in trade. It is not other jurisdictions as such which challenge our constitutional values, but rather the overlaps between jurisdictions, the legal and personal spaces where multiple sets of rules apply, but none has the power to govern constitutionally.

#### **E. Extraterritoriality: Who Should Regulate What?**

The fact that this picture of a fragmented and incomplete constitutionality has become the global norm makes it worthy of analysis. The most obvious response is to seek a proper allocation of interests or subjects of regulation: You regulate this and those, and we will regulate that and them. That such an allocation exists, or could exist, is often assumed. When a trade measure is accused of being “extraterritorial,” the implicit claim is that a line can be drawn between the proper subjects of regulators in different states, and that this line has been crossed.<sup>17</sup>

The conceptual basis for such a line is usually found in the difference between product regulation and production regulation.<sup>18</sup> The former, by addressing the nature of the product which is imported to the regulating state, is easily understood to be preventing harm in that state. This is generally uncontroversial. By contrast, where market access is made conditional upon compliance with environmental or social norms in the production process, the harm in question and the immediate subjects of the regulation are both located in the producing state. This is easily seen as an attempt to regulate matters that are properly regulated by the authorities of the producing state (i.e., an extraterritorial

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<sup>16</sup> See, e.g., Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 3–4 (2005).

<sup>17</sup> See Ankersmit et al., *supra* note 9; Bartels, *supra* note 5; Philippe Sands, ‘Unilateralism’, *Values, and International Law*, 11 EUR. J. INT’L L. 291, 293 (2000).

<sup>18</sup> See Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT’L L. 268, 291 (1997). See also PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* 95–116 (2005); Bernhard Jansen, *The Limits of Unilateralism from a European Perspective*, 11 EUR. J. INT’L L. 309, 310 (2000); John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT’L L. 303, 306–307 (2000).

interference in another state's business). The assumption is that a regulator should address matters occurring only in its own physical territory. Exceptions are sometimes made for matters considered to be offensive to all humanity—gross human rights violations or child labor, for example—but at least one initially plausible viewpoint is that here the line should be drawn.<sup>19</sup>

This viewpoint becomes more problematic the more it is examined. Its initial appeal lies in the perception that each community should rightfully look after its own interests, but not those of others. Legitimate self-interest and self-protection is implicitly contrasted with interference and busy-bodying. The problem with this is that the interests of a state and its population are not limited by territory. Most practically, for example, some local events have global consequences, such as the emission of carbon dioxide. But it is also quite plausible to claim that as human beings, inhabitants of a planet, we have an interest in preserving species, habitats, and the environment as a whole, even outside of the borders of our own state. Consider the contrary: Is it plausible to suggest that an individual has no interest in what happens to the planet outside those borders?

More seriously, the idea that interests always have a unique “owner” is logically incoherent.<sup>20</sup> Interests can only be rationally understood in terms of the conditions necessary for well-being, but well-being is a subjective state of affairs. Hence the interests of a population are necessarily in those things which they subjectively care about. The protection of public health, for example, is one of the less controversial reasons for state action: Who would deny that a state may—or should—act to protect the health of its population? Yet it only does so because the population cares about its health. It is the subjective concern which makes the interest real. Since people can, and do, care about what happens to other human beings, the interests of others are part of our own interests. The well-being of people in various jurisdictions is necessarily intertwined by the fact of our human concern or compassion for each other. When market access is made conditional upon social norms, the population of the regulating state is being protected from implication in acts which offend their basic values.<sup>21</sup> That population is also taking steps, via their laws, to change a situation which they experience as unpleasant. They are acting in their own interests, as well as those of others. Indeed, given that there is always the serious risk that process measures are ineffective and do not achieve their goals, such

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<sup>19</sup> See Bartels, *supra* note 5; Sands, *supra* note 17, at 300.

<sup>20</sup> See Charnovitz, *supra* note 5, at 70; Ankersmit et al., *supra* note 9.

<sup>21</sup> See Gareth Davies, *Morality Clauses and Decision Making in Situations of Scientific Uncertainty*, 6 WORLD TRADE REV. 249 (2007). See also Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 695 (1998); Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. INT'L ECON. L. 43, 69 (2008).

measures may be understood as primarily being about the interests of the regulating population: Whether or not the measures make life better for workers, they supply a moral comfort which adds to the quality of life in a way quite comparable to good health or public order. How does it feel to hold, see, or taste a product which has been made by exploited or mistreated workers, by destruction of ancient habitats, or at the cost of animal welfare? For some, that feeling is worth legislating to avoid. In wealthy countries, the some may become the many and even the majority.

The idea that interests can be separated does not therefore find a basis in an analysis of who is and should be concerned by what. Rather, any basis that it may have comes from the superposition of a new factor, with its own moral status: Sovereignty. Sovereignty invites the claim that, while all humans may be concerned about each other, and about the world as a whole, they should in some situations restrain that concern in order to respect the right and capacity of each community to determine its own living conditions.

This is, however, an assertion of the importance of respect for jurisdictional limits rather than an explanation. At its baldest it is no more than a sovereignty fetish, often rooted in historical traditions of a strong respect for this idea.<sup>22</sup> *Prima facie* it opposes sovereignty to humanity,<sup>23</sup> and it can only escape this unhappy tension if it can be shown that the assertion of sovereignty against out-of-state production measures is itself necessary to protect important human values, i.e., that the consequences of well-meant interference are not in fact good. That debate is worth having. There may well be good policy arguments for seeking to limit the extent and impact of regulation related to out-of-state production methods, but it is far from self-evident that a hard or clear line would emerge as an optimal approach.<sup>24</sup> Not only are states and interests factually intertwined in the world, but the trend of recent decades has been to question traditional approaches to sovereignty in this light, and even to emphasize the responsibility of states to those outside their borders.<sup>25</sup> The mood of the age is to dilute or nuance some of the more rigid historical dogmas of international law in the name of global well-being.

It is therefore perhaps not surprising that legal systems, until now, have shown no inclination to allocate interests. Where the legality of process and production measures has been adjudicated before the WTO or the European Court of Justice, there has been only a marginal test of the nature of the interest concerned, and a readiness to accept that

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<sup>22</sup> John H. Jackson, *The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited*, 4 J. INT'L ECON. L. 67 (2001).

<sup>23</sup> Andreas Follesdal, *Global Distributive Justice? State Boundaries as a Normative Problem*, 1 GLOBAL CONSTITUTIONALISM 261, 270–71 (2012).

<sup>24</sup> Jackson, *supra* note 18, at 306–07.

<sup>25</sup> C.f. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY* 107 (1999).

concern for plants, animals and persons in other jurisdictions is legitimate.<sup>26</sup> Legality has turned instead on questions of procedure and proportionality: Were parties consulted, and were the measures really necessary and effective?<sup>27</sup> These are to a large extent proxies for genuineness. The question these courts were asking themselves is whether the process and production measures in question were really aimed at protecting the environment, or whether they were an attempt to keep out inconvenient competition.

In fact, there is a remarkable consensus within legal discussion that interests are intertwined and that each party should take each other's interests into account. A party regulating out-of-state production processes makes this explicit, but a party objecting within the context of the EU or WTO is really making the same claim: They are asking the WTO or EU to restrain the regulation of the other state. A sovereignty-oriented view would concede to states a maximum freedom in determining their own interests and the terms of access to their own markets.<sup>28</sup> By contrast, where an extraterritoriality objection is raised within an international legal system, the claim is that such sovereign freedom should be, and is, limited (i.e., that states should not be able to determine their interests without taking into account the interests of others). The disagreement between the regulating and producing state is not really about the extent of sovereignty, but about whether they are listening to each other enough. Dialogue and mutual concern, all parties agree, is beyond question.

#### **F. The Global Governance "Solution"**

If regulatory pluralism cannot be avoided by an allocation of interests, then an alternative response is to look for constitutionality in a global legal architecture above and beyond national law.<sup>29</sup> Agreement on substantive norms and procedures, embodied in treaties, institutions and adjudicatory processes, could entrench a global consensus on the minimum norms necessary for morally acceptable trade or on the minimum standards for the treatment of people and the planet generally.

Such global harmonization would preempt regulatory pluralism, at least if it was understood to preclude further out-of-state process and production regulation within the relevant field. That would re-establish a classical constitutional order, in which rules were imposed by an accountable and democratic rule-maker—insofar as treaties and international institutions are accountable and democratic—on a scale matching the

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<sup>26</sup> Davies, *supra* note 5; Ankersmit et al., *supra* note 9.

<sup>27</sup> Scott, *supra* note 15; MADURO, *supra* note 15, at 173.

<sup>28</sup> Howse & Regan, *supra* note 5, at 275–76; JASON POTTS, THE LEGALITY OF PPMS UNDER THE GATT 35–36 (2008), available at [http://www.iisd.org/pdf/2008/ppms\\_gatt.pdf](http://www.iisd.org/pdf/2008/ppms_gatt.pdf).

<sup>29</sup> See Follesdal, *supra* note 23, at 265–68.

breadth of human activity, removing the disjunction between constitutional orders and regulatory power.

Many steps in this direction exist. There are treaties on the protection of the environment, and against child labor. The International Labour Organization is a global organization concerned with labor standards. The EU harmonizes the laws and regulations of its member states, partly to avoid the kind of problems discussed here. The WTO does not legislate and cannot itself create new norms, but its adjudicators can nurture, encourage, or obstruct the development of global standards by the way they approach national regulations derogating from free trade. Paradoxically, it could well be that by being hostile to unilateral process measures they do more to encourage the development of multilateral standards—which then become the only realistic approach—than if they continue their current tolerant and procedural assessment of national PPMs.<sup>30</sup> The relationship between WTO adjudication and global labor and environmental standards is a complicated one, but there is every reason to think that a non-trivial influence exists.

Yet the suggestion that working towards a more developed global legal order is an adequate response to regulatory pluralism is both unrealistic and, in principle, undesirable. It is unrealistic to think that a sufficient consensus can be reached on global environmental and social concerns: Agreements will tend to be a lowest common denominator, leaving many states frustrated and wanting to go further. Regulatory interference is thus not removed from the table, but merely confined. Agreements are less of an alternative for regulatory pluralism than a container for it. Moreover, if there was a substantive consensus on the norms in issue, then regulatory pluralism would probably not be an issue anyway, since national standards and practices would be less offensive to trading partners.

In any case, one of the most important motors of regulatory pluralism is the existence of the failed state, which is unable to live up to its own ambitions or those of its people and is unable to enforce laws or rights or enact them in an effective way. Global legal arrangements will not solve this. By contrast, importing states which adopt production measures, by exerting pressure directly on producers and traders, may be able to speak on behalf of interests and people which are effectively unrepresented by their own state.<sup>31</sup> The enforcing power of trade conditionality may be greater than that of the local police.

Aside from these practical considerations, international measures face too great a legitimacy problem to be a major part of a solution for a constitutional deficit. The

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<sup>30</sup> See Gareth Davies, *Is Mutual Recognition an Alternative to Harmonization? Lessons in Tolerance and Trade from the European Union for the WTO and other RTAs*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 265, 274 (Federico Ortino & Lorand Bartels eds., 2006); Sands, *supra* note 17, at 302.

<sup>31</sup> Such conditionality may also come from multinational corporations acting out of a sense of corporate social responsibility.

democratic control over international organizations and law is indirect, as is their accountability, and this prevents them achieving the depth of legitimacy required to justify legal colonization of the socially sensitive, complex, and context-specific fields involved in regulatory pluralism. Environmental and social norms may be expressions of universal values at some minimum level, but at any other they are expressions of intense and varying local preferences. Regulatory pluralism is not about enforcing a pre-agreed universal value set, but an attempt at propagating a specific set of values and choices elsewhere.

While this colonial aspect is what makes it so controversial, it is also what makes it important. Regulatory pluralism is an expression of the mutual involvement of communities with each other, and it is also something that is far more flexible, adaptable, and potentially expressive than a single global regime.<sup>32</sup> This matters because the issues involved are dynamic ones, where costs and benefits are complex and changing. They require a more sophisticated and targeted approach than framework agreements at the level of well-meaning banality. Different products, different trade flows, and different countries may raise different problems and need different solutions. Sustainable forestry, sustainable fishing, labor conditions in the footwear and clothing industries, bio-fuels, farming and diversity, animal welfare: These are the kinds of matters that can be the subject of process-based regulation, but the situation in one state is not that in another.<sup>33</sup> The reasons for intervention also vary, from the philosophical and political to the economic. On the side of the producing state, choices always have much to do with development and (relative) wealth. On the side of the (usually richer) importing states, concerns about the environment and social conditions are tied up with concerns about competition. Sometimes there is a dominant perception that it is unfair to permit foreign competitors to conquer domestic markets when they rely on practices which are morally offensive to the domestic majority and not open to domestic economic actors. Sometimes it is the more nuanced realization that domestic process regulation is only sustainable in practice if it is applied to imports too; otherwise, producers will migrate or domestic industry will be eliminated. A concern about competition can be a necessary part of a concern about another issue.

Most of these concerns are tied somehow, more or less directly, to the cost of production, and it is the cheapness of bad social and environmental practices which makes them attractive. Costs of production, however, are also fast-changing, and important drivers of competitive and comparative advantages can melt away under the wider influence of

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<sup>32</sup> See, e.g., Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 329 (Barry Weingast & Donald Wittman eds., 2008); Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 794–95 (1994); Jenia I. Turner, *The Expressive Dimension of EU Criminal Law*, 60 AM. J. COMP. L. 555, 579–82 (2012).

<sup>33</sup> For more examples, see Ankersmit et al., *supra* note 9.

increasing prosperity and decreasing wealth differences between states. If states are to respond to concerns about production methods elsewhere, then these responses will have to be revisited constantly, and states will require freedom of regulatory action. The risk of entrenching, and thereby freezing, rules, and even substantive norms, should be avoided.

The fluidity that is an inherent part of a desirable policy response to the fact of problems associated with trade and production provides another reason not to look to international treaties or organizations for an answer. It is hard enough for states to react at the pace of global economic development. An international legal architecture certainly cannot.

Such an architecture has the additional weakness that it is inherently centralized. Centralization is most likely to be acceptable and effective where there is consensus on the goals and methods of the law, creating a space suitable for technocrats, so that “objectively,” or at least inter-subjectively, appropriate rules can be made, as is sometimes claimed to be the case for competition law, for example.<sup>34</sup> By contrast, the situation being examined in this Article involves variable and varying values and a need for trial and error. For it is manifestly the case that whether market access conditionality will lead to a better world is a difficult and empirical question, and the answer is almost certainly “in some cases it may, in others it will not.” A fair trade scheme in one place may lead to farmers and their families enjoying better lives, while in another it may hinder development or consolidation which would ultimately benefit the communities involved. Economists, development experts, and political scientists debate and disagree, and it seems almost beyond controversy to suggest that perceptions will continue to develop as process measures are tried out and fail or succeed. The need, from a policy perspective, is not to eliminate state responses to each other’s social and environmental conditions, but rather to bring constitutionality to those responses: To treasure the freedom to exercise regulatory power in the name of out-of-state interests, but imbue that freedom with constitutional values.

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<sup>34</sup> See, e.g., GIANDOMENICO MAJONE, REGULATING EUROPE (1996); Giandomenico Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, 4 EUR. L. J. 5 (1998).

### G. Constitutional Pluralism

Constitutional pluralism is an idea emerging from recent legal scholarship on the EU.<sup>35</sup> Its philosophical background is in critiques of national constitutionalism, but the immediate cause of the idea's prominence and its practical relevance is the standoff between the European Court of Justice and various national supreme courts, notably the German Federal Constitutional Court, on the question of ultimate authority.<sup>36</sup> The roots of that conflict lie in the ECJ's assertion of the supremacy of EU law over national law, even over national constitutions.<sup>37</sup> While everyday supremacy is largely uncontroversial now, the supremacy of the treaties over national constitutions has been rejected quite explicitly by several national supreme courts, which have reaffirmed that EU law takes effect in their jurisdiction subject to their constitution.<sup>38</sup> There is no sign of this situation changing to any significant extent.

It is tempting to see this in terms of conflict, with the important question being "who is the ultimate boss?" or "who has the last word?"<sup>39</sup> These are questions about law in practice, but the story to which they are relevant is the story of European integration, and the interpretation of the various judgments from that perspective gives a story of a claim, of rejection, and now of a long period of more-or-less uncomfortable standoff. Possible endings which scholars may imagine, advocate, or fear include "surrender," "defeat," or "cold war." Surrender would describe the situation where national courts finally concede the subordination of their constitutions to EU law, resulting in the formation of a coherent and accepted European constitutional order in the classical hierarchical mold, i.e., a fully constituted EU. Defeat would entail the assertion of national court sovereignty in a real and substantive way, so that the claims of the ECJ were exposed as failures. This would amount to the containment of EU law within national legal orders and the limitation of the

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<sup>35</sup> See, e.g., MACCORMICK, *supra* note 25; Miguel P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *SOVEREIGNTY IN TRANSITION* 501 (Neil Walker ed., 2003); Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262 (2005); Walker, *supra* note 2; Pavlos Eleftheriadis, *Pluralism and Integrity*, 23 *RATIO JURIS* 365, 377–78 (2010); Joseph Weiler, *Prologue: Global and Pluralist Constitutionalism: Some Doubts*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 8 (2011).

<sup>36</sup> Julio B. Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 EUR. L.J. 389 (2008).

<sup>37</sup> Case 11/70, *Internationale Handelsgesellschaft*, 1970 E.C.R. 1125.

<sup>38</sup> PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* 268-97 (5th ed., 2011). See also Jan Komarek, *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, *VERFASSUNGBLOG* (Feb. 22, 2012), <http://www.verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/#.UJ6QZYfAcpZ> (discussing the recent decision of the Czech Constitutional Court).

<sup>39</sup> Mattias Kumm, *Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36 *COMMON MARKET L. REV.* 351, 351–52 (1999); Kumm, *supra* note 35.



EU to an organization for intergovernmental co-operation, however multifaceted and complex that co-operation might be. A traditional constitutional order would once again be reasserted, but this time at the national level. The third ending, “cold war,” means that neither side in fact accepts the claim to supremacy of the other, but neither translates their standpoint into concrete conflict.<sup>40</sup> Thus it remains a theoretical disagreement, smothered by consensus in practice. That has in fact been largely the situation for several decades and appears to be relatively stable.<sup>41</sup> Agreement on substantive questions of law has rendered disagreement on the question of who has the last word academic, and the loyalties of lower judges have not been tested. National courts have gone to the brink a few times, but their revolts have ultimately been of a relatively minor nature and containable.<sup>42</sup> Remarkably, the whole saga of the Constitutional Treaty, its rejection, and the reformation of the EU legal order within the Treaty of Lisbon have passed this story by, neither advancing nor undermining the claims of any of the courts involved, and leaving the question of ultimate authority as open as before.

The perspectives described above are perspectives on Europe, but an increasing group of scholars have begun to look at the standoff from a more constitutional perspective. Rather than taking sides on the Europe versus the Member States question, they look for constitutionality, or its absence, in the current situation. One of the driving forces of this investigation is the widespread realization that none of the endings offered above is satisfactory.<sup>43</sup> Surrender hands over too much power to a centralized and detached EU, and sidelines the history, rootedness, *demoi* and legitimacy of the Member States and their constitutional orders. Even the Europhile lawyer usually concedes that legal orders should be of and for the people, and accountable to them, and that the EU is not able to deliver on these fronts yet. Moreover, the moment when it is may never arrive, for its scale and internal diversity may mean that could never offer the degree of ownership, responsiveness and self-realization that an autonomous local order can.<sup>44</sup> Yet defeat for

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<sup>40</sup> Joseph H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT’L L.J. 411, 445–446 (1996); Arthur Dyeve, *Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Incident or Omen of Judicial Armageddon?* 18-20 (unpublished manuscript), available at <http://ssrn.com/abstract=2084639>.

<sup>41</sup> Dyeve, *supra* note 40, at 41.

<sup>42</sup> For further comments, see Komarek, *supra* note 38; Dyeve, *supra* note 40, at 20–27; Jan Komarek, *European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony* 6–17 (Jean Monnet Work Papers, No. 10/05, 2005).

<sup>43</sup> See Mattias Kumm, *Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 163 (Julie Dickson & Pavlos Eleftheriadis eds., 2012); Maduro, *supra* note 3.

<sup>44</sup> See the ongoing jurisprudence of the German Constitutional Court on this point, especially Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, Oct. 12, 1993, 89 BVERFGE 155; BVerfG, Case No. 2 BvE 2/08, June 30, 2009, 143 BVERFGE 2. See also CRAIG & DE BURCA, *supra* note 38, at 272–283.

the ECJ is hardly attractive either, for it would be a reassertion of an uncompromising national sovereignty. The dominant view in most branches of European legal scholarship is still that this is dangerous and regressive: The EU was born as a reaction to the inability of national legal orders to entrench and protect core human values. It is an embodied perception that the constitutional order in its best and most substantive sense requires a context wider than the state if it is to be realized. Closed national constitutional orders are weak, isolated, unable to guarantee the protections they preach, and ultimately unstable in a world where the winds of global economic and social change blow hard.<sup>45</sup>

Yet while these first two endings are undesirable for pragmatic, realistic reasons regarding the societies in which the constitutions find themselves, the third ending seems to be the worst yet: It is not constitutional at all. Cold war describes a situation in which the answer to questions such as “what is the constitutional order here?” or “what are your rights?” or “who is the final court?” is “I’m not quite sure.”<sup>46</sup> That lack of order seems at first glance to be the antithesis of constitutionality.

Constitutional pluralism offers another way of looking at this ambiguous standoff situation, which casts it in a more constitutional light and in which it may be—under certain conditions—a more authentically constitutional order than any other alternative.

The details of the idea can be presented in various ways. Constitutional pluralists are a broad group, with a range of views.<sup>47</sup> Critics of constitutional pluralism are perhaps even broader and may formulate the core idea in yet more ways. One of two propositions, however, is at the heart of most presentations of the idea.<sup>48</sup> Sometimes there is a focus on the observable fact that the EU contains a plurality of constitutional orders. The EU and its treaties, because of their characteristics—autonomy, rights, democracy, the power to order society—may be argued to be constitutional in all but the most semantic sense without denying that the Member States each have their own constitutional order too. The claim here is then a descriptive one: Multiple constitutional orders can and do co-exist within a single territory.

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<sup>45</sup> Walker, *supra* note 2, at 320.

<sup>46</sup> Gareth Davies, *Constitutional disagreement in Europe and the search for pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 269 (Matej Avbelj & Jan Komarek eds., 2012); Eleftheriadis, *supra* note 35, at 377–378.

<sup>47</sup> The collection of articles found in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Matej Avbelj & Jan Komarek eds. 2012) demonstrate this range of viewpoints. See also Matej Avbelj & Jan Komarek, *Four Visions of Constitutional Pluralism* (EUI Working Paper Law, No. 2008/21), available at <http://ssrn.com/abstract=1334219>.

<sup>48</sup> Both claims are similar to the first two of Maduro’s three claims. See Maduro, *supra* note 3.

Put like this, constitutional pluralism is of limited interest to lawyers. It is more of a social-empirical claim, rather like legal pluralism, which was initially an insight from anthropologists.<sup>49</sup> It is also vulnerable to some very forceful criticisms of its accuracy. On the one hand, is the EU really a constitutional order? On the other hand, are Member State constitutions still deserving of their name?<sup>50</sup>

An alternative formulation of constitutional pluralism is of more interest here. This formulation can be summarized in the following statement: A constitution can be plural, that is to say that a plurality of autonomous legal orders can together comprise an order which is constitutional. This is not quite the way that constitutional pluralism is put forward by its leading proponents, and some would object to several of its implications: It marginalizes certain classical aspects of constitutionality, notably institutional unity and final authority, in favor of a promotion of constitutional values.<sup>51</sup> In a number of ways, however, the formulation is true to the spirit and core insights which the scholarship on constitutional pluralism contains.

One idea which emerges from this work is that no single legal order can provide an adequate constitutionality in circumstances where other legal orders exert *de facto* power. It is then national legal constitutional traditions in their most traditional form, with their emphasis on the unitary and exclusive ordering of power, which are a betrayal of constitutionalism.<sup>52</sup> Such orders cannot provide accountability, the policing of power, and the protection of the individual in a globalized world, or in the EU.<sup>53</sup> Any single legal order is either too small for its function or too large to be responsive and rooted. Closed constitutions deny self-realization to their people, either through weakness or through distance.

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<sup>49</sup> Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 390–91 (2008).

<sup>50</sup> Davies, *supra* note 46.

<sup>51</sup> See Walker, *supra* note 2, at 341 (regarding the institutional aspect of constitutionalism as necessary). See also Nico Krisch, *The Case for Pluralism in Postnational Law* 40–42 (Law, Society, and Economy, Working Paper 12/2009) (preferring not to call such a state of affairs constitutional); Matej Avbelj, *Can European Integration be Constitutional and Pluralist—Both at the Same Time?*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 381 (Matej Avbelj & Jan Komarek eds., 2012). But see Maduro, *supra* note 3. Maduro is prepared to leave institutionalized hierarchy behind. See also Wiener, *supra* note 1, at 2–3; Jan Komarek, *Institutional Dimension of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 231 (Matej Avbelj & Jan Komarek eds., 2012).

<sup>52</sup> See Maduro, *supra* note 3; Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance* 22–23 (University of Michigan Public Law and Legal Theory, Working Paper No. 229, 2011).

<sup>53</sup> Walker, *supra* note 2, at 320.

Yet the core idea in normative constitutional pluralism—among those who advocate it rather than merely observing it—is that, while the various constitutions should interact, none should dominate the others.<sup>54</sup> Constitutional pluralism is above all other things a doctrine of non-domination. Each order speaks for certain legitimate groups and interests, but no order can speak for all.<sup>55</sup> Constitutionality entails that interests are represented, that a balance is sought between them, and—most classically constitutional of all—that they are taken account of in the exercise of power. In a plural situation, that requires constitutions to speak to each other.<sup>56</sup>

Such communication is premised on some degree of mutual respect and on some degree of underlying shared values.<sup>57</sup> It is in the discovery and expression of these that a plurality of orders comes to form a coherent constitutional whole. That process is one of communication and dialogue, not just between courts, although this has been the overwhelming focus of European study, but in all ways relevant to law and power. Constitutions and legal orders are means of self-expression, and it is ultimately communities which, globally or within the EU, are engaged in recognizing each other and accommodating each other because of their factual interdependence and intertwining.

Constitutional pluralism offers the view that the values of non-oppression, rights, and accountability can only be preserved in a plural system. A plural system in which there is no communication, however, leaves the exercise of power ignored and un-policed. It is the dialogue and respect between systems which makes pluralism potentially constitutional.<sup>58</sup>

Constitutional pluralism in this sense is thus a goal or a possibility rather than a description. The process will always be imperfect, and constitutionality has to be imagined as a question of degree. It suggests how regulatory pluralism could be constitutional and offers a way of looking at the global situation whose attraction is that there appears to be no plausible alternative.

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<sup>54</sup> The idea has also been referred to as constitutional tolerance. See Joseph Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* 54 (Kalypso Nicolaïdis & Robert Howse eds., 2002).

<sup>55</sup> Maduro, *supra* note 3.

<sup>56</sup> Joseph H. Weiler, *In Defense of the Status Quo: Europe's Constitutional Sonderweg*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 7 (Joseph Weiler & Marlene Wind eds., 2003); Maduro, *supra* note 35.

<sup>57</sup> Kumm, *supra* note 35.

<sup>58</sup> *Id.* See also Maduro, *supra* note 35.

## H. Global Constitutionalism

Does constitutional pluralism applied to regulatory pluralism give us global constitutionalism? That latter phrase is increasingly used by scholars of international law seeking to describe the growing networks of international organizations and laws, but also by those concerned about the issues of legitimacy that these raise.<sup>59</sup> Is there a global constitutional order? Should there be? Can there be? While this scholarship has been open to new ways of thinking about constitutionality, it has nevertheless tended to focus on international law and institutions, on domestic constitutions, and on their relationship or the choices that need to be made between them.<sup>60</sup> Only a few scholars have sought or found constitutionality in the reactions of different national orders to each other: As an attitude and as a phenomenon of an unordered field, as it were.<sup>61</sup>

Constitutional pluralism shows how this can be the case, that the constitutional can be found in values embedded in laws derived from multiple sources via communicative processes. This is a better prospect for constitutionality on a global scale because it is something which is achievable, which can be realistically worked towards, and, above all, is something which corresponds to the values of constitutionalism rather than only a selection of its abstract forms.<sup>62</sup>

That is not to say that global constitutionalism has arrived. Instead, a picture of what it might look like begins to emerge, as do the kind of steps that need to be taken to go in that direction—above all, that lawmakers and courts take account of wider interests than those of their own constituents and listen to those in other jurisdictions. To continue the process of constituting the international legal order, there is therefore a need for reflexivity and mutual learning.<sup>63</sup> This is not just a horizontal process, but should also take place between the different organs of the legal order, including courts, lawmakers, and people. As we see in the EU, judgments may lead to laws, laws may lead to change, and outrage may lead to treaties. All the processes which support the exercise of regulatory power by jurisdictions on each other are involved in a “networked constitution” which emerges—or does not—

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<sup>59</sup> Wiener, *supra* note 1, at 12.

<sup>60</sup> See RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); Wiener, *supra* note 1, at 7–11. See also Halberstam, *supra* note 52, at 4–5.

<sup>61</sup> Halberstam, *supra* note 52; Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 GLOBAL CONSTITUTIONALISM 16, 50 (2012).

<sup>62</sup> Halberstam, *supra* note 52, at 37.

<sup>63</sup> Walker, *supra* note 2, at 336.

from shared and discovered values.<sup>64</sup> Reality may reveal this process to fail in many ways. It is, however, the only show in town.

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<sup>64</sup> Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 EUR. L.J. 33 (1997).

